have led to such knowledge, both he and his client are chargeable therewith; and where such allegations were made for the purpose of showing a joint cause of action against two defendants, one a citizen of the state and the other of another state, it is a fair inference that the defendants were joined for the sole purpose of preventing a removal of the cause by the nonresident defendant.

PLEADING—DEMURRER—STATUTORY RIGHT OF ACTION.—A complaint in an action for libel is demurrable if it fails to allege that before bringing suit plaintiff gave the notice required by the statute under which the action was brought. *Williams* v. *Smith* (N. C.), 46 S. E. 502.

Per Connor, J.:

"Neither our own nor the researches of the learned and diligent counsel have enabled us to discover any case in which this or any similar statute is construed in regard to an action for libel. We are compelled, therefore, to resort to an examination of the question upon general principles and the construction put upon statutes relating to other actions in which the same or similar provisions are found. 'Under the rule both of the common law and under the Codes, when the statute gives a new remedy and prescribes conditions, or if an action of a certain class or against certain parties be authorized only after the performance of similar conditions, the performance of these conditions, whether the right of action exists at common law or is created by statute, must be alleged in the complaint and proved at the trial.' 4th Enc. Pl. & Prac. 655. The principle is clearly stated and well illustrated in *Reining* v. *Buffalo*, 102 N. Y. 308, 6 N. E. 792. The legislature of New York enacted that 'no action to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented,' etc. Ruger, C. J., said: 'The inquiry is whether this provision was intended as a condition precedent to the commencement of an action, or simply to furnish a defense to the city in case of an omission to make such demand. We think the plain language of the statute excludes any doubt on the subject. It absolutely forbids the prosecution of any action until the proper demand has been made. It attaches to all actions whatsoever, and by force of the statute becomes an essential part of the cause of action, to be alleged and proved as any other material fact. It does not purport to give the city a defense dependent upon an election to use it, but expressly forbids the institution of any suit until the preliminary requirements have been complied with. . . . It is competent for the legislature to attach a condition to the maintenance of a common-law action as well as one created by statute, and, when this is done, its averment and proof cannot safely be omitted.'

"This court has given to a similar statute the same construction. Section 757 of the Code provides 'that no person shall sue any city, county, or other municipal corporation for any debt or demand whatsoever unless the claimant shall have made a demand upon the proper municipal authorities.' The section expressly requires the demand to be alleged in the complaint. This court has uniformly held that a failure to allege the demand may be taken advantage of by demurrer. *Love* v. *Commissioners*, 64 N. C. 706. Bynum, J., in *Jones* v. *Com-*

missioners, 73 N. C. 182, says: 'That a demand was necessary before action begun is well settled. If, therefore, it had appeared from the complaint that no demand had been made, that would have been good cause of demurrer.' *School Directors* v. *Greenville*, 130 N. C. 87, 40 S. E. 847. In *Nichols* v. *Nichols*, 128 N. C. 108, 38 S. E. 296, it is held that the provision in the statute (Code, sec. 1287) that in an action for divorce the complaint should be accompanied by an affidavit setting forth that the facts relied upon as ground for divorce had existed, to plaintiff's knowledge, six months, was mandatory, and that filing such affidavit was essential to give the court jurisdiction of the action. *Hopkins* v. *Hopkins*, 132 N. C. 22, 43 S. E. 508."

This is directly in point as an illustration of the rule laid down in *Savings Bank* v. *Powhatan Clay Manufacturing Company* (Va.), 9 Virginia Law Register 898.

We should be remiss in not calling attention in this connection to the case of *Walden* v. *Jamestown* (Ct. App., N. Y., April 8, 1904), 31 N. Y. Law Journal 243, holding that a city charter provision that in an action against the city for personal injuries from defective streets, the plaintiff must show, in order to maintain the action, that notice in writing of the place of accident was given to the mayor, or other officer named, within forty-eight hours after its happening, is substantially complied with when the notice is given three days thereafter, where, in the meantime, the plaintiff was in such condition from the injury as to be unable to transact business. A substantial compliance with the terms of the statute is sufficient.

Counsel for plaintiff urged that the exceedingly brief time allowed for the service of the preliminary notice is not only unreasonable and shocking to the sense of justice, but unconstitutional as depriving the plaintiff of property without due process of law. The court declined to pass upon this question, being of opinion that there was a "substantial compliance" with the statute. It sought to justify its action by decisions which it cited, all, with one exception, being its own, but we think that it stepped upon dangerous ground, necessitating the opening of the door to innumerable questions of a like kind. If the courts can extend a maximum time prescribed by the legislature for the doing of one act, they can be logically invoked to grant the same leave in an indefinite number of other cases if "substantial compliance" alone be the criterion. Thus, in the case of the thirty days within which to file a bill of exceptions—the fifteen days within which a petition for a rehearing may be filed, the thousand limitations in procedure with which the New York Code abounds, or, to broaden the illustration, *any* statute of limitations, the principle must be the same. Why should not a Virginia plaintiff be allowed to institute his action for damages for personal injuries within 366 days after the tort committed, as he is within 364? It is no answer to say that it is because the statute designates the time as one year, for, under the New York view, that requirement is not binding, but is met by a substantial compliance—whatever that may mean—in each case that may arise. The difference is only one of degree and not of kind. Where is the line to be drawn, if once the departure be made? If the court had the right to extend the time from two days to three, it surely had the right to extend it to four, five, ten or more, according to the hardship of the case. The referee found

that up to the time for the preparation and service of the notice, the plaintiff was suffering much pain through and in consequence of her injuries and was in a condition in which she was unable to transact business. But it was not found that she was under a recognized legal disability. Recurring again to the Virginia statute, suppose that she had been thus "unable to transact business" for a year after the injury, would a plea of limitations have been overruled?

We think that the New York court would have done better to meet the question of the constitutionality of the statute squarely and to have resolved it in the negative, for, as was urged by counsel, the requirement of notice within forty-eight hours was practically the abrogation of the remedy—and the consequent reduction of the right to *nil.* Nor is the question to be confined within the limits above suggested. If the courts are to recognize and approve substantial compliance with one statute as equivalent to technical compliance, why not with another? If the principle be sound as to the statutes of limitation, why should it not apply to statutes of any kind containing apparently mandatory provisions? It seems to us that the court took the wrong fork of the road to a just decision.